

**United States Department of Labor
Employees' Compensation Appeals Board**

M.A., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Anaheim, CA, Employer)

Docket No. 16-1846
Issued: October 20, 2017

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 19, 2016 appellant filed a timely appeal from an August 18, 2016 nonmerit decision of the Office of Workers' Compensation Program (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated June 23, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 26, 2014 appellant, then a 46-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging a low back condition that she attributed to 10 years of

¹ 5 U.S.C. § 8101 *et seq.*

carrying a heavy satchel and delivering packages. She identified September 16, 2014 as both the date she first became aware of her condition and realized that it was related to her federal employment.

In a November 20, 2014 duty status report (Form CA-17) Dr. Basimah B. Khulusi, a Board-certified physiatrist, diagnosed lumbar disc herniations and identified work restrictions.

By letter dated December 8, 2014, OWCP informed appellant that additional medical evidence was required in support of her occupational disease claim. It afforded her at least 30 days to submit a narrative medical report from her physician.

OWCP subsequently received a September 25, 2014 lumbar magnetic resonance imaging (MRI) scan that revealed multilevel disc herniations and bulges (L3-4, L4-5, and L5-S1). It also received an October 17, 2014 lower extremity electrodiagnostic study that was normal.

In a November 10, 2014 narrative report, Dr. Khulusi noted appellant's history of injury and treatment. She also provided a detailed description of appellant's letter carrier duties. Dr. Khulusi diagnosed aggravation of lumbar degenerative disc disease, bilateral lumbar radiculopathies, lumbar disc syndrome, and lumbar disc herniations. Regarding causation, she explained that appellant was working as a letter carrier for the employing establishment for the last 10 years. Dr. Khulusi advised that from 2010 onward, appellant worked with restrictions to include no lifting more than 30 or 35 pounds because of an injury to the left ankle, left shoulder, and right knee. Appellant had no bending and twisting restrictions placed on her low back. Dr. Khulusi also explained that for the previous six years of her work, when she had no restrictions, appellant had to do repetitive bending and twisting of her back, lift weight of different magnitudes up to 70 pounds, load and unload hampers at the back of her vehicle, carry a heavy satchel for multiple hours per day, and push and pull heavy hampers. She explained that the repetitive straining and spraining of the soft tissue structures of her low back over the last 10 years resulted in weakening of the structures to the point where appellant ended up having herniated discs at multiple levels in her lumbar spine as detailed in the MRI scan report. Dr. Khulusi recommended modifications to appellant's job activities to prevent her condition from worsening. She opined that appellant's "condition [was] the natural consequence of the distinctive conditions of her employment and her distinctive job requirements."

OWCP referred appellant to Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the relationship between her claimed condition(s) and factors of her federal employment.

In a February 11, 2015 report, Dr. Einbund described appellant's history of injury and treatment.² He explained that appellant related that due to the repetitive nature of her job duties she gradually began experiencing pain in her low back. Dr. Einbund noted that she would take

² Dr. Einbund also noted that appellant had prior claims, including an occupational disease claim, assigned OWCP File No. xxxxxx403, with an October 2012 date of injury due to repetitive standing and walking. OWCP accepted the claim for sprain of knee, cruciate ligament on the right, derangement of posterior horn of medial meniscus on the right and chondromalacia of the patella on the right. OWCP also accepted appellant's claim, assigned OWCP File No. xxxxxx964, for a left shoulder strain which resulted on October 23, 2013, when appellant stepped on uneven pavement, lost her balance and landed on her left arm.

over-the-counter Ibuprofen for pain to continue working. He related that in September 2014 after about six months of continued pain, she came under the care of Dr. Khulusi and Dr. Herring, an orthopedic surgeon. Dr. Einbund indicated that an injection and additional physical therapy had not been approved. He noted that appellant had complaints of low back “throbbing” pain which was frequent, radiating into the bilateral buttock region, and the symptoms intensified with prolonged standing. Dr. Einbund explained that, at the time appellant’s low back symptoms began, she had been working with restrictions of no walking for more than six hours and weight restrictions of approximately 15 pounds, but she did not miss time from her job due to her low back symptoms. He advised that her job duties included: delivering mail to residences and businesses; sorting and processing mail; repetitive lifting of containers full of mail and magazines; climbing in and out of her vehicle; carrying a mail satchel weighing up to 30 pounds, and working for eight hours a day, five days a week, with occasional overtime. Dr. Einbund also noted that the physical aspects of her claim included: prolonged standing, walking, bending, kneeling, stooping, reaching in all directions; gripping and grasping; fine manipulation; pushing and pulling; and lifting and carrying mail and containers.

Dr. Einbund examined appellant and determined that she had paravertebral tenderness in the lumbar spine.

Regarding range of motion of the back, Dr. Einbund found that she lacked two inches in fingertips to toes on forward flexion, and extended herself 20 degrees, with right and left lateral bending of 20 degrees, and rotation of the back to 50 degrees on the right and left. He found that appellant had a normal gait and could walk on her heels and toes. Additionally, Dr. Einbund determined that she had full range of motion of both hips, knees, and ankles; hip flexion to 110 degrees and hip internal rotation to 20 degrees; external rotation to 45 degrees and hip abduction to 50 degrees, and hip adduction to 20 degrees; knee extension of 0 degrees, knee flexion of 135 degrees; ankle extension to 15 degrees, ankle flexion to 40 degrees; ankle inversion of 25 degrees; ankle eversion of 15 degrees, and straight leg raising which was normal at 90 degrees, on the right and left. He further found normal sensation in both lower extremities, good femoral, popliteal, dorsalis pedis and posterior tibialis pulses bilaterally.

Dr. Einbund found normal strength in the quadriceps, hamstrings, plantar flexors/extensors, and extensor hallucis longus muscles, with a negative Patrick’s sign bilaterally. He noted that an x-ray of the pelvis revealed no evidence of fracture, dislocation, or degenerative changes.

Dr. Einbund also found that a lumbosacral spine series revealed no evidence of fracture or dislocation, with very mild anterior osteophyte formation at L4 and L5. He diagnosed lumbosacral degenerative disc disease, nonindustrial. Dr. Einbund opined that the diagnosis was nonindustrial and there was no work-related factor of disability. He explained that the underlying lumbar spine degeneration might produce pain or discomfort with performing appellant’s work duties, but there was no etiological relationship. Furthermore, there was a reported preexisting disability as related to appellant’s prior claims to her feet, right knee, and left shoulder. Dr. Einbund opined that appellant did not suffer from residuals of any work-related injury relative to her lumbar spine. He indicated that any necessary treatment related to her lumbar spine would be nonindustrial.

Dr. Einbund assigned restrictions related to the lumbar spine to include: no lifting, pushing or pulling over 20 pounds, not to exceed six hours out of an eight-hour day. Additionally, he noted that bending and stooping should be limited to three hours per eight-hour day. Dr. Einbund specified the limitations related to appellant's nonindustrial degenerative disc disease. He completed a work capacity evaluation dated February 19, 2015 with the above-noted restrictions.

In a January 26 2015 duty status report, Dr. Khulusi diagnosed lumbar disc herniations and recommended no lifting over 15 pounds and limitations of the push cart of no greater than 50 pounds.

By decision dated February 24, 2015, OWCP denied appellant's claim. It specifically noted that Dr. Einbund opined that the diagnosed condition was not causally related to the claimed work injury. Dr. Einbund determined that there was underlying lumbar spine degeneration which might produce pain or discomfort with performing her work duties. He explained that there was no etiological relationship and appellant did not suffer any residuals of any work-related injury to her lumbar spine.

On March 30, 2015 appellant requested reconsideration.

In a March 16, 2015 report, Dr. Khulusi noted that OWCP's decision was based upon the second opinion of Dr. Einbund because he was a Board-certified orthopedic surgeon. She further argued that Dr. Einbund did not provide an accurate report and it was also deficient because he was lacking in knowledge regarding appellant's work injuries, repetitive injuries or disorders and cumulative trauma disorders. Dr. Khulusi noted that she had previously submitted a report dated November 10, 2014 wherein she explained in detail the activities that appellant participated in for years at the employing establishment. She referred to the Center for Disease Control (CDC) National Institute of Occupational Safety for Health and described a work-related musculoskeletal disorder. Dr. Khulusi also indicated that there was evidence of a positive relationship between the back disorder and physical work as well as strong evidence that low back disorders were associated with work-related lifting and forceful movements. She referenced recent medical articles and explained that there was evidence that work-related awkward postures were associated with low back disorders. Dr. Khulusi argued that Dr. Einbund's report was deficient and based upon speculations and conjectures. She repeated her request for OWCP to accept the claim for acceleration of degenerative disc disease of the lumbar spine, bilateral lumbar radiculopathies, lumbar disc syndrome, and lumbar disc herniations.

In February 23, March 23, and May 26, 2015 duty status reports (Form CA-17), Dr. Khulusi diagnosed lumbar disc herniations. She recommended work restrictions of no lifting over 15 pounds and limitations of the push cart of no greater than 50 pounds. Dr. Khulusi continued to submit reports.

By decision dated June 23, 2015, OWCP denied modification of its prior decision.

OWCP subsequently received duty status reports (Form CA-17) dated June 30 and October 22, 2015, and January 20, 2016 from Dr. Khulusi, which contained work restrictions. Dr. Khulusi continued to diagnose lumbar disc herniations.

On June 3, 2016 appellant again requested reconsideration.

Appellant submitted a May 26, 2016 report from Dr. Khulusi who noted that in its June 23, 2015 decision OWCP accorded the weight of the medical opinion evidence to Dr. Einbund. Dr. Khulusi argued that she was just as qualified as Dr. Einbund and her opinion was just as probative. She further argued that OWCP falsely determined that her reference to the CDC National Institute of Occupational Safety for Health did not provide an explanation as to how the bilateral lumbar radiculopathies, lumbar disc syndrome, and lumbar disc herniations were caused by appellant's work duties. Dr. Khulusi contended that she had provided OWCP with all of the information needed to establish the claim, which included objective evidence in her clinical notes, especially her November 10, 2014 notes. She also referenced the FECA procedure manual and argued that the claims examiner did not evaluate his report in conjunction with the case record. Dr. Khulusi argued that her opinion as a physiatrist was equal to that of an orthopedic surgeon, and appellant had met her burden of proof as it was not necessary to prove causal relationship beyond a reasonable doubt. Dr. Khulusi repeated her request for OWCP to accept the claim for acceleration of degenerative disc disease of the lumbar spine, bilateral lumbar radiculopathies, lumbar disc syndrome, and lumbar disc herniations.

By decision dated August 18, 2016, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was irrelevant or immaterial and insufficient to warrant further merit review.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁵ A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously

³ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System; *see* Chapter 2.1602.4b.

considered by OWCP.⁶ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

Appellant timely requested reconsideration of the June 23, 2015 decision on June 3, 2016. The underlying issue on reconsideration is medical in nature, whether she met her burden of proof to establish her claim for an occupational disease.

In a May 26, 2016 report, submitted on reconsideration, Dr. Khulusi argued that her opinion was of equal weight to the opinion of the second opinion physician Dr. Einbund. She disagreed with OWCP's finding that he did not provide an explanation as to how the bilateral lumbar radiculopathies, lumbar disc syndrome, and lumbar disc herniations were caused by appellant's work duties. Furthermore, Dr. Khulusi argued that she had provided OWCP with all of the information needed to ascertain appellant's claim. She repeated her request for OWCP to accept the claim for acceleration of degenerative disc disease of the lumbar spine, bilateral lumbar radiculopathies, lumbar disc syndrome, and lumbar disc herniations. OWCP denied appellant's request for reconsideration, finding that it did not include substantive legal questions or include relevant and pertinent new evidence. The Board finds that the May 26, 2016 report from Dr. Khulusi while new, essentially reiterated the opinions and arguments proffered in her earlier reports. Therefore, it does not constitute relevant, pertinent new evidence related to the issue of whether appellant established an occupational disease or injury causally related to factors of her federal employment. The Board has held that evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁸

Likewise Dr. Khulusi's duty status reports dated June 30 and October 22, 2015 and January 20, 2016 were repetitive of her prior reports as they repeated her diagnoses and, thus, do not constitute a basis for reopening the case.⁹

Appellant therefore did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or constitute relevant and pertinent new evidence not previously considered. As she did not meet any of the necessary regulatory requirements of 20 C.F.R. § 10.606(b)(3), she is not entitled to further merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.608(a), (b).

⁸ *D.K.*, 59 ECAB 141 (2007).

⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 20, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board